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In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (B. & O. J.S. App. A) [1] is reported at 238 F. Supp. 528. The reports of the Interstate Commerce Commission (B. & O. J.S. App. C) appear at 321 I.C.C. 17 and 322 I.C.C. 491.

JURISDICTION

The judgment of the three-judge district court was entered on February 18, 1965. The notice of appeal was filed on April 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

[1] "B. & O. J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Baltimore & Ohio R.R. Co., et al. (No. 143, O.T., 1965).

Baltimore & Ohio R. Co. v. *United States,* 298 U.S. 349; *New England Divisions Case,* 261 U.S. 184.

QUESTION PRESENTED

Complaints were filed with the Interstate Commerce Commission under Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) asking the Commission to determine the fairness of so-called divisions agreements between more than 300 rail carriers apportioning revenues received from the transcontinental transportation of freight under joint rates. The Commission prescribed new divisions through a consideration of data and findings relating to the three geographic groups of carriers involved. The question presented is whether, in addition to the group findings thus made, the Commission was required to make individual findings with respect to the factors relevant under Section 15(6) for each of the 300 railroads involved, including the specific amount of dollars of revenue required by each carrier to meet expenses and provide a fair return and the financial effect in dollars as to each carrier of the newly prescribed divisions.

STATUTES INVOLVED

Section 1(4) of the Interstate Commerce Act (49 U.S.C. 1(4)), and Section 8(b) and 10(e) of the Administrative Procedure Act (5 U.S.C. 1007(b) and 1009(e)), are set forth in Appendix D of the Jurisdictional Statement filed in No. 143 by Baltimore & Ohio R.R. Co., et al.

Primarily involved is Section 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)), which provides:

> Whenever * * * the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential * * * the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

STATEMENT

1. PROCEEDINGS BEFORE THE COMMISSION

A joint rate is established when two or more carriers publish a single charge for the carriage of freight from the originating point on one line to a destination on another. The proportion or division of the joint rate which each line receives as its share of the haul is normally determined by agreement among the participating railroads. Congress, however, has empowered the Commission upon complaint or upon its own

initiative to prescribe new divisions of rates if it finds that existing shares are "unjust, unreasonable, inequitable, or unduly preferential" (49 U.S.C. 15(6)).

This case arises out of the Interstate Commerce Commission's 1963 orders prescribing new revenue divisions on freight traffic moving under joint rates between points in the East,[2] the Midwest,[3] and the Rocky Mountain Pacific[4] sections of the United States. The rates subjected to the Commission's orders produce almost $1.5 billion in revenues annually, and the shift in revenues which would result from the new divisions would be approximately $45 million a year. (B. & O. J.S. 107a).

The Commission orders were entered in a consolidated proceeding involving two separate complaints. In 1954 all of the principal Eastern railroads filed a complaint against all major railroads west of Chicago and the Mississippi River charging that the existing divisions of joint rates for freight transportation were unfair and therefore unlawful. The divisions so attacked had been voluntarily established in 1887 and, except for modification in minor respects, have been in effect since 1922 without revision or Commission approval. The principal Midwestern railroads thereafter filed a similar complaint against the Mountain-Pacific and Eastern lines, assailing the lawfulness of

[2] Eastern (or "Official") territory lies generally east of Lake Michigan, Chicago, Peoria and Cairo, Illinois, and St. Louis, Missouri, and north of the Ohio River and Norfolk, Virginia.

[3] Midwestern territory is generally the area lying between Official territory and Mountain-Pacific territory.

[4] Mountain-Pacific territory embraces generally all of the eleven Mountain-Pacific States except the southeastern corner of Wyoming, eastern Colorado, and eastern New Mexico.

(1) divisions of joint rates for transportation between Midwestern and Transcontinental territories [5] (agreed to in 1874 and, as modified, in effect since 1925 without revision or approval of the Commission), and (2) the Midwestern share of primary western divisions of joint rates for transportation between Eastern and Transcontinental territories as to which the Midwestern carriers performed intermediate service.

The parties aligned themselves into three groups (Eastern, Midwestern and Mountain-Pacific) and submitted their cases on the basis of evidence as to groups. Upon completion of the consolidated proceeding in 1963, the Commission found that the existing divisions were in violation of Section 15(6) in that they unduly favored the Mountain-Pacific carriers by giving them a greater share of revenues from joint rates than that to which they were entitled. Considering each of the Section 15(6) criteria as it applied to the groups concerned, the Commission found that none of the groups of carriers is more or less efficiently operated than the other; that there are no differences in the importance to the public of the services of the three groups of carriers or in the extent to which the groups are originating, intermediate or delivering lines, but that there are decisive differences in the relative costs of service and revenue needs of the three carrier groups.

[5] Transcontinental territory is the western part of Mountain-Pacific territory and lies generally west of El Paso, Texas, Belen and Albuquerque, New Mexico, Salt Lake City and Ogden, Utah, Boise, Idaho, and the western border of Montana.

The Commission found that, based on their costs of performing the service, "the present divisions are favorable to the [Mountain-Pacific lines] to an extent not justified by ascertainable cost differences" (B. & O. J.S. 95a); and that "revenues of the eastern and midwestern lines derived from the present divisions are too low in relation to costs" (B. & O. J.S. 132a). These conclusions were supported principally by findings that for Eastern-Transcontinental traffic, the Mountain-Pacific carriers received a share of revenue 4.6 percent more than their share of the cost of furnishing the service while the Midwestern railroads received 0.3 percent less, and the Eastern roads 4.3 percent less than their costs in providing the service. On Midwest-Transcontinental traffic, the Commission found that existing divisions gave the Mountain-Pacific carriers 4.4 percent more than their share of the cost of furnishing the service, while the Midwestern lines obtained an amount correspondingly less (B. & O. J.S. 67a–68a).

Next, the Commission determined that the revenue needs of the Eastern and Midwestern roads were substantially greater than those of the Mountain-Pacific carriers (B. & O. J.S. 90a). In reaching that conclusion, the Commission relied on a variety of considerations. First, it noted the "phenomenal growth" in economic development and population in the 11 Western States since 1940 (B. & O. J.S. 72a). Second, it discussed the volume of total freight transported during the years 1946–1958 as compared with the period 1923–1930 and found a 124 percent increase for the Mountain-Pacific carriers, whereas the increase of the Eastern roads amounted to only 12

percent. Similarly, the Commission determined that in terms of total freight revenue produced, the share of the Western roads had risen from 36 to 42 percent while that of the Eastern carriers had declined from 43 to 37 percent (B. & O. J.S. 72a–73a). Next the Commission found that for the period 1946–1958, the rate of return from all services based on investment was 3.26 percent for the Eastern lines and 3.34 percent for the Midwestern roads, compared with 3.89 percent for the Mountain-Pacific carriers (B. & O. J.S. 88a). In addition, the Commission found that, because of a decrease in the profitable volume of freight originating within their own borders, the Eastern lines had less earning power as freight carriers than the Mountain-Pacific roads and that their prospects for increased freight income were poorer (B. & O. J.S. 88a–89a, 143–144a). Finally, the Commission noted that although the Mountain-Pacific lines had a smaller increase in net railway operating income from all services during the years 1950–1958, this was primarily due to their increased passenger deficits which obscured the Western lines' more favorable net railway operating income from freight service (B. & O. J.S. 82a–88a, 141a).

Having concluded that the present divisions favored the Mountain-Pacific railroads when considered in light of both cost and revenue needs, the Commission prescribed new divisions which would increase the share of joint rates for the Eastern and Midwestern carriers. The Commission found that the new divisions "would produce moderate increases in some of the most important midwestern divisions" (B. & O.

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J.S. 104a) which were "supported by the evidence concerning cost of service" (B. & O. J.S. 153a). The Commission also spot-checked the effect of its orders on Eastern-Transcontinental traffic and found that the new divisions increased the share of the Eastern carriers 16.4 percent, although, even with the increase, the Eastern lines' share of the revenue was still proportionately less than their costs (B. & O. J.S. 144a–145a).

2. PROCEEDINGS IN THE DISTRICT COURT

In June, 1963, the Mountain-Pacific group of railroads brought suit before a three-judge district court to enjoin enforcement of and to set aside the Commission's orders establishing the new divisions of joint rates. The court held that the Commission's findings failed to satisfy the requirements of Section 15(6). In the court's view, the Commission was required to make the Section 15(6) findings for each individual carrier involved in the proceeding, and not merely for each group of carriers. In addition, the court held that the Commission was required to find the revenue needs of each carrier and group in specific dollar amounts, and the extent to which the divisions prescribed would produce the needed revenue (B. & O. J.S. 19a–20a):

> The court concludes that divisions in rates of return are not equivalent to divisions in terms of dollars and that divisions so stated do not satisfy the requirements of the statutes involved * * *. The court further concludes that to comply with the provisions of the * * * Interstate Commerce and the Administrative Procedure Acts * * * the Commission is required to make affirmative findings which disclose that the

> requirements of Section 15(6) have been met and the factors therein required have been determined and considered, not only as to the groups of roads involved but with respect to each carrier affected in said groups; that findings must be made as to the amount of revenue, in terms of dollars, required by the respective carriers affected in any new divisions prescribed, the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required * * *.

The district court set aside the Commission's orders and remanded the case for additional findings.[6]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal raises important questions concerning the administration of Section 15(6) of the Interstate Commerce Act, under which the Commission is charged with assuring that revenue from joint rates be divided among carriers on a basis that is "just, reasonable and equitable." The district court has held that, in revising the existing divisions among more than 300 carriers on transcontinental service, the Commission must make findings as to each factor relevant under Section 15(6) for every individual carrier involved as well as for the geographical groups of carriers participating in the service. The district court thus re-

[6] The court, however, granted a stay of judgment and enjoined the enforcement of the Commission's orders pending appeal. Accordingly, the old divisions are still in effect subject to conditions requiring a financial settlement among the carriers back to the effective date of the Commission's orders (July 1, 1963 (B. & O. J.S. 118a)) if the orders are sustained on appeal.

jected a procedure previously approved by this Court—which the carriers here had followed before the Commission—of presenting the relevant data and making the necessary analysis on a group basis. In thus denying the Commission the option to consider large rate divisions cases on a group basis, the district court placed on the Commission a burden so heavy as to nullify its ability to resolve this or any subsequent case of similar magnitude. The issues raised require plenary consideration by this Court if Section 15(6) is to be administered effectively.

1. The district court erred in holding that the Commission is required to make findings with regard to each of the Section 15(6) factors "not only as to the groups of roads involved but with respect to each carrier affected in said groups" (B. & O. J.S. 20a). This Court has consistently rejected this contention in such inter-territorial divisions cases as *New England Divisions Case,* 261 U.S. 184, 197–199, *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 81–83, and *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349. The fixing of divisions on the group basis has thus long been recognized and the Commission here merely adhered to that practice.[7]

[7] Historically, the Commission has been dealing with carriers on a group basis in rate-making and divisions cases since the "first of the great rate-level proceedings," *Increased Rates, 1920,* 58 I.C.C. 220. III-B Sharfman, *The Interstate Commerce Commission* (1936), p. 102. Sharfman notes that the first problem confronting the Commission in applying the statutory rule of rate-making (15 U.S.C. 15(1)) involved the determination as to whether rates should be adjusted for the carriers as a whole "or by rate groups or territories to be designated by the Commission, and if the latter, what rate groups or

A group approach to large interterritorial divisions cases is compelled as a practical matter; the Commission could not well have proceeded otherwise in this case and effectively administered the law. Compliance with the district court's requirement here would have meant that, before the Commission could have adjusted the divisions, it would have been compelled separately to investigate more than 300 railroad carriers in detail to determine, in the words of the statute, "the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers * * *." Faced with such a burden, it is unlikely that the Commission would ever have been able to revise the existing unjust divisions.

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territories shall be so designated." The carriers and shippers agreed that a grouping of the roads was essential in view of the "wide differences in commercial and transportation conditions in different parts of the country," and they favored the designation of three major territories (East, South and West). But because of "important differences of conditions prevailing in the eastern and in the western portions of the western district," the Commission modified the proposed groupings so as to give separate treatment to carriers in the territory west of Colorado. As a result, "four groups of carriers were established for purposes of applying the rule of rate-making: Eastern, Southern, Western, and Mountain Pacific." *Id.*, 103–104. This procedure was then adopted in the first major divisions proceeding conducted by the Commission when, in 1921, the carriers in New England territory complained that the shares accruing to them out of their joint freight rates as established in 1921 were too low. *New England Divisions*, 62 I.C.C. 513.

Even here, where the proceedings were tried by the parties and considered by the Commission on a group basis, nine years were required for an administrative resolution.

Thus it was never contemplated that divisions should be fixed with mathematical precision as to each carrier where that would be a practical impossibility.[8] Rather, this Court has approved the Commission's use, as in this case, of typical evidence in large divisions proceedings, "evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." *New Eng-*

[8] Indeed, it is clear that only very limited use could be made of the detailed data required by the district court. First, the Commission could decide that certain carriers did not appropriately belong within the geographical group with which they had aligned themselves, because their conditions were so different from other group members as to require individual treatment. But this possibility was provided for by the Commission procedure enabling an aggrieved carrier to except itself from the order on a proper showing. A second possible use for the individual findings would be to demonstrate that the data with respect to some carriers was so extreme as to distort the group findings. Here again, however, the Commission allowed for such a showing. Thus, the Mountain-Pacific carriers contended that two of the Eastern roads were inefficiently operated. The Commission considered, but rejected, such allegations (B. & O. J.S. 78a–79a, 92a). Accordingly, the only new purpose to be served by individual findings would be to challenge the propriety of the groups themselves—either to create new groups or to assure a fair and equitable arrangement between every two connecting lines irrespective of the groups to which they have long belonged. However, this effort to achieve a perfect arrangement for dividing revenues would make it impossible for the Commission to proceed in a practical manner to prescribe fair divisions generally.

land Divisions Case, 261 U.S. 184, 196–197. That it is essential for the Commission to proceed on a group basis using data typical of the group was recognized by Mr. Justice Brandeis in the *New England Divisions Case* (261 U.S. 197): "To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past and how it had dealt with them."

Indeed, the parties themselves in this case recognized the futility of individual adjudication. No carrier questioned the Commission's authority to make findings and dispose of the proceedings on a group basis. On the contrary, each geographical group requested the prescription of similar divisions for all carriers in the group and no individual railroad asked for special consideration apart from its group—as might have been done under the *New England Divisions Case, supra*, 261 U.S. at 199—to avoid any individual injustices flowing from group consideration.

In sum, the district court's rejection of the Commission's group consideration conflicts with established practice under decisions of this Court. Moreover, it would make impossible the administration of the Commission's duty effectively to supervise the fairness of divisions in transcontinental traffic. It is therefore of great importance to the administration of the Act that the judgment below be reversed.

2. The district court further erred in holding that

the "revenue needs" clause of 15(6) requires the Commission to find "the amount of revenue required" in terms of dollars for each carrier and for the groups of carriers concerned. The statute neither expressly nor impliedly demands that revenue needs be determined in exact dollar amounts, rather than on a comparative basis, as a prelude to readjusting divisions under Section 15(6).

The Commission adequately took revenue needs into account in this case without determining specific dollar amounts. The Commission first found that the Eastern and Midwestern roads were receiving a smaller share of revenue than the Mountain-Pacific carriers in proportion to their costs of performing the services involved. The Commission then went on to consider the other factors listed as relevant in Section 15(6), including revenue needs. It found that none of the carrier groups could be said to be inefficient, or unimportant to the public, so that the costs of each group were entitled to equal recognition. (B. & O. J.S. 92a–95a). It determined, however, that the growth in population of the Mountain-Pacific States and the resulting economic changes favoring the Mountain-Pacific roads in terms of revenue miles and operating income indicated that the Eastern and Midwestern carriers needed a greater share of the revenue than they were presently receiving (B. & O. J.S. 72a–74a). The Commission also discussed the revenue requirements of the contending carrier groups in terms of their rates of return based on net railway operating income from all services (B. & O. J.S. 76a–82a), and the returns attributed to the service covered by the divisions in question (B. & O. J.S. 64a–68a).

These methods are the customary and conventional ways of determining relative revenue needs and have been approved in every major divisions case considered by this Court. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 359–360; *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 87.

Thus, after making the basic determination that the Eastern and Midwestern lines were not receiving a share of the divisions which fairly reflected their costs, the Commission also fully considered whether this judgment should be altered in light of revenue needs. The district court did not comment on the method employed by the Commission except to state flatly that the statute requires findings of revenue needs in terms of dollars. In this respect the court was clearly wrong: To arrive at the basic conclusion that the divisions improperly favored one group as against another and that adjustment was required to divide the revenues fairly, it was not necessary for the Commission to go beyond methods of comparison and to determine dollar requirements in absolute terms. Again the district court's decision, by placing upon the Commission an overwhelming burden of inquiry not justified by the purpose of the Act, would seriously interfere with the Commission's administration of Section 15(6).

3. Finally, the district court incorrectly held that the Commission was obliged to find "the financial effect of the Commission's orders in terms of dollars as to the carriers and the extent to which the new divisions prescribed will produce the revenue found to be required" (B. & O. J.S. 20a).

After concluding that new divisions were necessary to remedy the existing unlawful shares, the Commission reapportioned the divisions, using modifications of the existing formulas agreed to by the carriers. By sampling the new divisions thus established, the Commission found that "moderate increases" in some of the most important Midwestern divisions would be accomplished and that the share of the Eastern lines would be increased 16.4 percent on Eastern-Transcontinental traffic (B. & O. J.S. 104a, 144–145a). The Commission noted that, even with this increase, the Eastern lines would still be receiving slightly less than their share of the cost of the service (B. & O. J.S. 145a). Having found earlier that the various factors under 15(6) would fully justify giving the Eastern roads a share of the revenues proportionately equal to their costs, the Commission was clearly warranted in increasing the Eastern carriers' share of the revenue to a point slightly below that level.

New divisions as prescribed by the Commission are not intended to produce any specific increase or decrease in the revenues of any group of carriers.[9]

[9] As the Commission recognized, the prescription of "just, reasonable and equitable divisions for the future is in no sense a transfer of money" or a "mere partition of property" (B. & O. J.S. 133a). In *Divisions of Freight Rates*, 156 I.C.C. 94, the Commission made no findings regarding the effect of the new divisions prescribed, and refused to reopen the proceedings to receive such evidence. The district court held that the denial of a rehearing was not an abuse of discretion, *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 36 F. 2d 789, 798 (W.D. Mo.), and this Court affirmed the judgment sustaining the Commission's order without comment on this question, 282 U.S. 74.

Rather, the objective of the Commission is to assure fairness and equity as between the participating carriers. It is thus unnecessary for the Commission to be concerned with absolute dollar returns. Indeed, in presenting their case to the Commission, the appellee carriers never contended that the Commission was required to find the effect of its orders on the revenue needs of each carrier; the absence of such findings was criticized only in the petition for reconsideration of the Commission's initial report.[10] Even then, however, none of the individual carriers demonstrated that the impact of the new divisions would be unjust or unreasonable because of failure to yield operating expenses chargeable to the service performed plus a reasonable return on the property value fairly attributable to that service. In these circumstances, it would have served no useful regulatory purpose for the

[10] In the court below, appellees' contention concerning the necessity for findings as to individual carriers was limited to the revenue needs factor of Section 15(6) and was argued only as to the Denver and Rio Grande Western Railroad Company. This was inconsistent with their position before the Commission where they opposed the prescription of divisions for individual Mountain-Pacific carriers. In any event, this contention and the contentions of the Missouri-Kansas-Texas Railroad and the St. Louis-San Francisco Railroad, two Midwestern lines who intervened as plaintiffs below because of alleged losses of revenue as a result of the newly prescribed divisions, were specifically dealt with and rejected by the Commission in its Supplemental Report (B. & O. J.S. 147a, 156a–158a). No justifiable reason was established for excepting any of these three carriers from the general basis of divisions prescribed. The Commission's orders do, however, permit the Denver and Rio Grande Western and its connections to establish just and reasonable sub-divisions. The orders also permit all carriers to agree to departures from the prescribed primary divisions for the "purpose of grouping or of equalizing competing routes or gateways" (B. & O. J.S. 169a).

Commission to have ascertained the precise differences in dollars between revenue to be produced by the new divisions as compared to revenue received under the existing divisions.

CONCLUSION

The district court has so interpreted Section 15(6) as to seriously impair the Commission's power effectively to conduct rate divisions cases. The court showed no justification flowing from the purposes of the Act for establishing its novel requirements, which are inconsistent with this Court's prior decisions and past Commission practice. This appeal thus presents substantial questions in the administration of the Interstate Commerce Act and probable jurisdiction should be noted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
ROBERT B. HUMMEL,
JERRY Z. PRUZANSKY,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
ARTHUR J. CERRA,
Associate General Counsel,
Interstate Commerce Commission.

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